## ONG GUAN HUA v. CHONG

[C. A. (Thomson C.J., Hill and Good JJ.A.) September 18, 1962]

[K.L. — F.M. Civil Appeal No. 26 of 1962]

*Bills of Exchange — Suit on cheques — Cheques given in payment of gaming transactions — Whether enforceable — Bills of Exchange Ordinance, 1949, ss.29(3) and 30(1).*

*Contract — Contracts (Malay States) Ordinance, 1950, s.30(1).*

*Gaming — Difference between English and Malayan laws — Civil Law Ordinance, 1956, s.26(1), (2), (3) and (4).*

In an action based on a contract it is for the plaintiff to prove consideration, in an action on a negotiable instrument consideration is presumed and it is for the maker or the endorser of the instrument if he wishes to defend the action to prove that there was no consideration.

Where at any stage of its history there has been consideration for a bill and there is no question of illegality of consideration then it can be sued on and if the original drawer is sued it is for him to prove that at no time has there been consideration.

In Malaya there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statutes which correspond to the English Gaming Acts of 1845 and 1892.

*Cases referred to:—*

(1) *Strachan* v. *Universal Stock Exchange (No. 2)* [1895] 2 Q.B. 697, 704.
(2) *Haigh* v. *Town Council of Sheffield* L.R. 10 Q.B. 102.
(3) *Fitch* v. *Jones* (1855), 5 E. & B. 238.
(4) *Lilley* v. *Rankin* (1887), 56 L.J. (Q.B.) 248.
(5) *Woolf* v. *Hamilton* [1895] 2 Q.B. 337.

COURT OF APPEAL.

*Lal Singh Muker* for the appellant.

*Robert K. C. Hoh* for the respondent.

*Cur. Adv. Vult.*

**Thomson C.J.:** The facts of this case are by no means clear, mainly because none of the parties would appear to have felt themselves under any very strong compulsion to speak the truth, but as either admitted or found by the trial Judge I think they are as follows.

At various dates in 1955 the plaintiff, who is the respondent to the present appeal, paid $4,000 to one Lim Beng Hean who was the second defendant in the original proceedings but is not a party to this appeal. $500 of this sum was later repaid by a cheque which was met on presentation and we are not concerned with that sum here.

The money was used to finance a series of gambling transactions in "paper rubber" with a firm called Gee Hong. These transactions resulted in considerable losses. The plaintiff's story, which was not believed by the trial Judge, was that he knew nothing about the transactions with Gee Hong and that the money was what he called a "friendly loan" to Lim. Lim's story was that the money was handed to him by the plaintiff for the purpose of speculating on the plaintiff's behalf with Gee Hong because he, Lim, was more familiar than was the plaintiff with this type of speculation.

Be that as it may, some time later Lim endorsed and delivered to the plaintiff a series of seven cheques each for $500 in purported repayment of $3,500 of the money handed to him by the plaintiff. Each of these cheques was drawn to "cash" by one Ong Guan Hua who was the first defendant in the original proceedings and who is the present appellant. His story regarding these cheques, which was supported by Lim but was disbelieved by the trial Judge, was that the cheques had originally been handed to Lim in repayment of loans made by Lim to Ong but in each case the amount in question had subsequently been paid to Lim in cash. Ong gave no reason why when making these cash payments he did not obtain the return of the relevant cheques or, having failed to obtain their return, did not stop payment of them and no doubt this was one circumstance which influenced the trial Judge in disbelieving him.

To proceed, however, the plaintiff presented the cheques for payment and none of them was paid. Three of them were returned by the bank marked "refer to drawer"; the other four were returned marked "out of date".

Almost immediately afterwards, on 31st July, 1957, the plaintiff commenced the present proceedings by way of Plaint under the Civil Procedure Code. His case as pleaded was that he was suing on the cheques and that these had been given in partial repayment of a "friendly loan" of $4,000.

Both defendants filed defences.

The defence of the first defendant was that he was not aware that the cheques had been negotiated to the plaintiff, that they were not duly presented and that the plaintiff had not given notice of dishonour. The plaintiff had thereby lost all his remedies as a holder in due course. There is not a word in this defence relating to any gaming transaction and it is to be noted that at no time has any attempt been made to amend it.

The defence of the second defendant was that the cheques were given in part-payment of losses in respect of gaming transactions relating to rubber and that accordingly the plaintiff had no enforceable claim against him.

In the event the case came on for trial on 31st January, 1962, by which time the parties had apparently forgotten what they had told their lawyers in 1957. Suffian J. rejected the first defendant's defences of non-presentation and no notice of dishonour and found as a fact that he had not made any payments to the second defendant in settlement of the cheques. He found that as between the plaintiff and the second defendant the cheques were given by way of repayment of money advanced by the plaintiff to the second defendant for the purpose of gaming and lost in the course of gaming

transactions and that therefore by reason of section 26(4) of the Civil Law Ordinance the transaction was unenforceable. On these premises he entered judgment for the plaintiff against the first defendant for the amount claimed and dismissed the suit against the second defendant.

Against that decision the first defendant has now appealed and, disregarding certain grounds of appeal which were abandoned, his only ground of appeal is that by reason of the cheques having been delivered by the second defendant to the plaintiff in connection with gaming transactions the plaintiff has no claim against him on the cheques which in law is enforceable.

It is to be observed that that ground of appeal relates to a defence which the appellant at no time raised at the trial. At no time did he make any attempt to amend his defence as originally pleaded and that defence had nothing to do with gaming. In the circumstances there is room for very grave doubt as to whether he should be allowed to raise it now. As, however, the whole business would seem to have been very thoroughly investigated at the trial I do not think there will be any injustice if we consider the question notwithstanding.

Before proceeding further two things must be remembered.

In the first place what we are dealing with is not an action on an agreement which is set up as a contract, it is an action on negotiable instruments. The difference which is important here is that in an action based on a contract it is for the plaintiff to prove the consideration. In an action on a negotiable instrument, however, consideration is presumed and it is for the maker or the endorser of the instrument if he wishes to defend the action to prove that there was no consideration. This is because of section 30 of the Bills of Exchange Ordinance (section 30 of the English Act of 1882) which reads as follows:—

"Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value."

The reason for this provision is clear. As has been said by the draftsman of the 1882 Act (*Chalmers' Bills of Exchange*, 10th ed., p. xlix):—

"In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit."

In the second place it is to be observed that the law in this country relating to contracts or agreements by way of gaming and wagering is not the same as the law of England. Section 26(1), (2) and (3) of the Civil Law Ordinance, 1956 and section 30(1) of the Contracts (Malay States) Ordinance, 1950 reproduce section 18 of the English Gaming Act of 1845, and section 26(4) of the Civil Law Ordinance is the same as section 1 of the English Gaming Act of 1892. These are the provisions of the law in England which make certain contracts relating to gaming and wagering unenforceable. There is, however, nothing in our law which corresponds with the English Gaming Acts of 1710 and 1835, one result of which is that securities given in respect of wagers on games and pastimes (including horse-racing) are to be deemed to be given upon an illegal consideration. In this country, then, there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statutes which correspond to the English Gaming Acts of 1845 and 1892.

The 1892 Act does no more than extend the consequence of non-enforcibility to a wider range of contracts relating to gaming than fall within the four walls of the 1845 Act, section 18 of which provides that contracts by way of gaming and wagering shall be null and void and that no suit shall be brought or maintained to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager has been made.

With regard to these provisions of section 18 of the 1845 Act A. L. Smith L.J. made the following observations in the case of *Strachan* v. *Universal Stock Exchange (No. 2)*:— [1]

"It will be seen that this section does not make the agreement illegal, but renders it void; and, as was well pointed out by Lush J. in *Haigh* v. *Town Council of Sheffield* [2], a wager by the statute is made a thing of neutral character — it is not forbidden. The statute leaves an ordinary betting debt a mere debt of honour, depriving it of all legal obligation, but not making it illegal."

I now proceed to consider the case of *Fitch* v. *Jones* [3]. In that case the facts were that one Needham owed the plaintiff £100. The defendant had given Needham a note for £40 in payment of a bet relating to the price of hops, a type of wager which was not illegal by reason of the 1710 and 1835 Acts but which as a contract was unenforceable by reason of section 18 of the 1845 Act. Needham endorsed the note over to the plaintiff in part payment of his debt and the plaintiff sued the defendant upon it.

For the defendant it was pleaded that by reason of the bill having been originally given in payment of a gaming debt there was no consideration but Coleridge J. told the jury that it lay on the defendant to prove the absence of any consideration and that the evidence as to that was in favour of the plaintiff. The jury found for the plaintiff.

In deciding the subsequent appeal Lord Campbell C.J. said (at p. 245):—

"The question therefore comes to be whether this note was given for a consideration merely equivalent to no consideration, or whether the note was given in an illegal transaction. I am of opinion that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract, which, even before stat. 8 & 9 Vict. c. 109, the law would not enforce: but it was not illegal;

there is no penalty attached to such a wager; it is not in violation of any statute nor of the common law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all. .....

.....

The note then being given, not on an illegal consideration, but merely on a void consideration, the presumption which the plaintiff would be called upon to rebut did not arise; and consequently what my brother Coleridge said to the jury was accurate."

Erle J. said this (at p. 246):—

"It is clear that the general rule of law is that, when a party to a negotiable instrument pleads a plea excusing him from the fulfilment of the duty of paying according to the tenor of the instrument, the burden of proving the plea lies on him. It is also clear that, when the plea alleges that the instrument had its inception in illegality or fraud, and that the plaintiff took it without value, proof that the instrument had its inception in illegality or fraud raises a presumption that the plaintiff took it without value; and so far shifts the burden of proof that, unless the defendant gives satisfactory evidence that there was consideration for the instrument, the allegation in the plea that there was no consideration will be taken to be proved. The question in the present case is whether this note was brought within the category of notes tainted with illegality within the meaning of the rule. I am of opinion that it was not. I think that the defendant might without violating any law make a wager. If he lost he might without violating any law pay what he had lost, or give a note for the amount. I am of opinion, therefore, that the proof in this case had the same legal effect as if it had been proved that the defendant made Needham a present of this note. It is not as if the note had been given for an illegal consideration, or a fraudulent consideration; but the defendant is in the predicament of a person who voluntarily, as far as law is concerned, gives a negotiable instrument."

In the later case of *Lilley* v. *Rankin* [4] the defendant had given two promissory notes to one Baird in payment of losses sustained in the course of dealings in stocks and shares which were admittedly gambling transactions conducted by Baird on his behalf. Baird endorsed the notes over to the plaintiff in settlement of genuine stock exchange transactions. The plaintiff successfully sued the defendant and on an application for a new trial Huddleston, B., pointed out that if the notes had come within the provisions of the 1710 and 1835 Acts they would have been illegal but they did not and the 1845 Act merely indicated that contracts by way of gambling or wagering should be void and not recoverable by legal process. Smith J. pointed out that the consideration for the notes was not illegal but void only and went on to say:—

"It might have been that the notes were given without consideration as between Rankin and Baird; still, if they were indorsed over for value to Lilley, the latter could recover on them."

On the other hand in the case of *Woolf* v. *Hamilton* [5] it was held that where a cheque was given by the defendant in payment of bets upon horse-races lost by him and indorsed by the payee to the plaintiff for value with notice of the consideration for which it was given the plaintiff could not recover because by reason of the 1835 Act the cheque was to be deemed to have been given for an illegal consideration.

To my mind the only difference between the cases of *Fitch* v. *Jones* and *Lilley* v. *Rankin* on the one hand and the present case on the other is that in each of the English cases the instrument sued on was originally given for what the law regards as no consideration and was then endorsed on for good consideration whereas in the present case the cheques sued on were originally given for good consideration and were later endorsed on for no consideration. The law, however, seems to be clear that where at any stage of its history there has been consideration for a bill and there is no question of illegality of consideration then it can be sued on and if the original drawer is sued it is for him to prove that at no time has there been consideration. This results from the provisions, already quoted, of section 30(1) of the Bills of Exchange Ordinance to the effect that every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

In the present case it would be wrong to express any opinion whatsoever regarding the correctness of the trial Judge's decision as regards the defendant Lim which has not been appealed against. As regards the appellant Ong, however, the position would seem to be abundantly clear. His signature appeared on the cheque and therefore by reason of section 30(1) the onus was on him to prove there was no consideration. He failed to discharge that onus and indeed on the trial Judge's findings of fact he could not have discharged it. In the circumstances Lim became a holder of the bill in due course, that is to say for value, and consequently when he endorsed it over to the respondent the respondent became the holder in due course irrespective of whether he held for value or not by reason of section 29(3) of the Bills of Exchange Ordinance which reads as follows:—

"A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

There is no question of fraud and there is no question of illegality by reason of any gaming transaction. In the circumstances I can see no reason why the respondent should not have succeeded, as he did, in recovering as against the appellant. I would accordingly dismiss the appeal with costs.

**Hill J.A.:** I have read the judgment of the learned Chief Justice and agree that this appeal should be dismissed with costs.

I have no wish to add anything myself, but in view of the nature of the arguments by counsel before us, I feel that I should emphasise my agreement with the view of the law as expressed by the Chief Justice in relation to sections 30(1) and 29(3) of the Bills of Exchange Ordinance when he states:—

" The law, however, seems to be clear that where at any stage of its history there has been consideration for a bill and there is no question of illegality of consideration then it can be sued on and if the original drawer is sued it is for him to prove that at no time has there been consideration."

**Good J.A.:** I have read the judgment of the learned Chief Justice and agree that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors: *Lovelace & Hastings; Eugene Lye & Hoh.*

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## *Re* SIM KHOON SENG'S APPLICATION

**[A. Cr. J. (Rose C.J.) September 19, 1962]**

**[Singapore — Criminal Motion No. 1 of 1962]**

*Local Government — Nuisance order — Whether Magistrate competent to vary abatement order to that of closing order at subsequent hearing — Local Government Ordinance, 1957, s.248.*

*Interpretation — Strict construction of penal statute.*

A Magistrate has no jurisdiction to make a further order at a subsequent time upon a fresh summons regarding the same default under section 284 of the Local Government Ordinance when at the original hearing he had made an abatement order under that section. These matters being quasi-criminal in their nature, the normal rule as to strict construction of a penal statute should apply and any ambiguity should be resolved in favour of the subject.

*Case referred to:—*

(1) *In re Chung Lit & Chung Ah Kam* [1952] M.L.J. 123, followed.

CRIMINAL MOTION.

*K. K. Bezboruah* for the applicant.

*Lim Seow Beng* for the owners of premises.

*Sachi Saurajen* (Deputy Public Prosecutor) for the City Council.

**Rose C.J.:** This motion raises a purely technical point under the Local Government Ordinance, 1957.

The facts are not in dispute and the only matter that arises is one of interpretation of section 248 of the Local Government Ordinance (Ordinance No. 24 of 1957).

The relevant part of section 248 reads as follows:—

" 248.— (1) If either—

(a) the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying with any of the requisitions thereof within the time specified; or

(b) the nuisance, although abated since the service of the notice, is in the opinion of the local authority likely to recur on the same premises,

on complaint by the local authority a Magistrate's Court hearing the complaint may make on such person a summary order, in this Ordinance referred to as a 'nuisance order'.

(2) A nuisance order may be an abatement order or a prohibition order or a closing order or a combination of such orders.

(3) An abatement order may require a person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order.

(4) A prohibition order may prohibit the recurrence of a nuisance.

(5) An abatement order or prohibition order shall, if the person on whom the order is made so requires or the Court considers it desirable, specify the works to be executed by such person for the purpose of abating or preventing the recurrence of the nuisance.

(6) A closing order may prohibit a dwelling-house from being used for human habitation.

(7) A closing order shall only be made where it is proved to the satisfaction of the Court that by reason of a nuisance a dwelling-house is unfit for human habitation, and, if such proof is given, the Court shall make a closing order and may impose a fine not exceeding four hundred dollars."

The point taken by learned counsel for the applicant is that it is not competent for the Magistrate to make a closing order at a subsequent hearing when at the original hearing he elected, under subsection (2) of section 248, to make an abatement order only.

The argument is that it is open to the Magistrate, after hearing any necessary evidence and considering any relevant submissions, to make either an abatement order or a prohibition order or a closing order or a combination of such orders. But having once made his choice he cannot at a subsequent hearing in relation to the same default vary the decision.

These matters being, at the least, quasi criminal in their nature, it seems to me that the normal rule as to strict construction of a penal statute should apply and that any ambiguity — if there is an ambiguity — should be resolved in favour of the subject. Moreover, the only authority to which learned counsel were able to refer me supports this view, although admittedly the passage in question is *obiter*. In *In re Chung Lit & Chung Ah Kam* [1] at page 128 Spenser Wilkinson J. says:—

" There is a further point regarding this closing order, which was not taken at the hearing before me. The original Notice called upon the owner to abate the nuisance within one month from the service of the Notice. The owner failed to comply so that one month after service, which was effected on the 7th July, 1950, he was in default. Upon this default the owner was summoned in pursuance of section 247(1) and appeared before the Court. It was then open to the Court both to impose a fine and then make an order, which under sub-section (2) of section 247 could be an abatement order or a prohibition order or a closing order or a combination of such orders. After hearing the parties the Magistrate made an abatement order only. I am inclined to think that that was the end of the proceedings and I doubt whether the Magistrate had any jurisdiction to make any further order at a subsequent time upon a fresh summons regarding the same default. Under sub-section (9) of section 247 the owner could, of course, be summoned, as he was, and fined; but having refrained from making a closing order when the matter was properly before the Court on the 18th October, 1950 I find it difficult to see under what provision of the law a further nuisance order in the shape of a closing order could be made on the 7th March, 1951. As, however, the point was not argued before me I express this view only tentatively."

I respectfully agree with this view. That being so I consider I have no alternative but, albeit with some regret, to set aside the closing order.

*Closing order set aside.*

Solicitors: *K. K. Bezboruah; Boswell, Hsieh & Lim.*